Supreme Court, U.S.
FILED

02 1834 JUN 13 2003

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE A. MCCRADY

Petitioner, *pro se*,

vs. Case No.

THE TOWN OF WARDENSVILLE,
HARDY COUNTY, WILLIAM MOOMAU,
DONALD ROTRUCK,and DAVID WARREN

Respondents

PETITION FOR WRIT OF CERTIORARI

United States Court Of Appeals For The Fourth Circuit
(Name of court that last ruled on merits of case)

Terrence A. McCrady
1326 Marlboro Road
Stephens City, Va. 22655
(540) 869-5242

21 pp

Questions Presented

This Petitioner wishes that this Court review the DENIAL of his appeal by the U.S. Court of Appeals for the Fourth Circuit, on February 12, 2003, and its subsequent DENIAL of petition for rehearing filed March 19, 2003, in regard to the DISMISSAL of the §1983, Title 42 U.S. Code civil suit he filed in U.S. District Court, Northern District of West Virginia. Said denial was due to "failure to state a claim upon which relief may be granted," since all of the named parties were entitled to immunity.

Question 1. A municipality, county or other political subdivision is not immune from civil liability under §1983, Title 42 of U.S. Code under the "theory of *respondeat superior*" if the tortfeasor employed by the political subdivision possessed "final policymaking authority" for the respective municipality or county relating to this action.

Question 2. Relating to question 1, the Petitioner was denied discovery to show "final policymaking authority" on the part of the tortfeasors named in this action, although this Court as well as federal appeals courts have recognized the need for discovery in actions against public officials.

Question 3. The merits of the case were never considered. The law favors disposition of litigation on its merits and dismissal is harsh sanction to be resorted to only in extreme cases.

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Northern District of West Virginia
Entered November 7, 2002
Case No. 3:02cv23

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United States Court of Appeals
for the Fourth Circuit
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Filed March 19, 2003
No. 02-2421
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Citations of Reports and Opinions by the Courts

Cases:

Edwards v City of Goldsboro, 178 F3d 231, 243-44 (4th Cir. 1999)

McNair v Lend Lease Trucks, Inc., 95 F3d 325, 328 (4th Cir. 1989)

Monell v NYC Dep't of Soc, Servs., 436 US 658, 694 (1978)

Republican Party of N.C. v Martin, 980 F2d 943, 952 (4th Cir.) Cert. denied, 510 US 1993, citing 5 AC . Wright & Miller, Fed. Practice and Procedure § 1356 (1990)

Jurisdiction

The basis for jurisdiction of this Court are the federal issues within §1983, Title 42, of U.S. Code.

1. The judgment in Federal District Court for the Northern District of West Virginia dismissing Petitioner's case with prejudice was entered on November 7, 2002.

2. The judgment by the Federal Court of Appeals for the Fourth Circuit which denied Petitioner's appeal was entered on February 12, 2003.

3. The denial of Petitioner's Petition for Rehearing by the Federal Court of Appeals for the Fourth Circuit was filed March 19, 2003.

4. §1254 (1), Title 28, Chapter 81, of the U.S. Code confers on this Court jurisdiction to review on a writ of certiorari the judgment in question.

Constitutional and Statutory Provisions Involved

Federal Rules of Civil Procedure, Rule 12, Notes 122, 130 & 135

Federal Rules of Civil Procedure, Rule 12(b)(6)

U.S. Constitution, Fourteenth Amendment

USCS Title 28, Chapter 81, §1254(1)

USCS Title 42, §1983

Statement of the Case

This is a case of malicious, unjust prosecution and arrest and imprisonment of the Petitioner, in violation of §1983, title 42 of the U.S. Code. It involves the subornation of perjury of police officers by a prosecuting attorney, the ignoring of exculpatory evidence, as well as deliberate misrepresentations of facts by the prosecutor before a tribunal.

It originated in the state courts of West Virginia, but was removed to federal court since it contained federal constitutional issues. Petitioner attempted to have the complaint severed, with the state issues to be remanded to state courts, however, Federal District Court denied this motion. This would therefore constitute the basis for federal jurisdiction in the court of the first instance. Petitioner then amended his original complaint to conform to federal law, namely Title 42, §1983 of U.S. Code.

This action was dismissed by the federal district court hearing it, on the grounds that it failed to state a claim upon which relief can be granted, since all of the defendants were protected by absolute immunity. The Petitioner was never granted a hearing in person or by phone, and the merits of the case were never addressed by the court.

Reasons for Granting the Writ

QUESTION ONE

The judge in Federal District Court dismissed this action against the Town of Wardensville and Hardy County under the theory of *respondeat superior*, citing the case of Monell v. N.Y.C. Dep't. of Social Services, 436 U.S. 658, 694 (1978). Not only was this a misapplication of law as held by this Court in the above case, it was in direct conflict with other relevant decisions of this Court and other federal appeals courts.

Syllabus #3 from Monell v. N.Y.C. Dep't. of Soc. Servs. states;

> "On the other hand, the language and legislative history of §1983 compel the conclusion that Congress did not intend a local government to be held liable solely because it employs a tortfeasor--"

"Soley" is the key operative word in this statement. The Town of Wardensville and Hardy County are proper and liable defendants under §1983 because the individuals named as defendants, who were the tortfeasors, possessed "final policymaking authority." In other words, it was the decisions made and actions taken by William Moomau and Donald Rotruck, on behalf of and authorized by Hardy County and the Town of Wardensville respectively, that were the proximate cause of injuries to the Petitioner.

Syllabus #2 from this case clearly affirms the liability of the named local governments;

> "Local governing bodies (and local officials sued in their official capacities) can, therefore , be sued directly under §1983 for monetary, declaratory, and injunctive relief in

> those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may be fairly said to represent official policy. In addition, local governments, like every other §1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels."

Petitioner emphasizes that this policymaking authority was contained within his pleadings. From his complaint;

Complaint # 37: Plaintiff alleges that under policy of the town of Wardensville, Chief Rotruck was the "final policymaking authority" regarding the issue in question; that is, whether to initiate murder charges against the Plaintff, and how to conduct the investigation.

Complaint # 38: Plaintiff alleges that under policy of Hardy County, William Moomau was the "final policymaking authority" regarding the issue in question: that is, whether to initiate the prosecution of the Plaintiff, and how it would be implemented. Plaintiff further alleges other incidents similar in nature have occurred in Hardy County.

The dismissal of this case by the Federal District Court and upheld by the U.S. Court of Appeals for the Fourth Circuit conflicts with other relevant decisions of this Court, and of other U.S. Courts of Appeals. Many of these decisions have been rendered after 1978, the date of Monell v. N.Y.C.Dep't. of Soc. Servs. They are as follows:

> City may be held liable in civil rights action under §1983 for supervisory employee's conduct if employee possesses

"final policymaking authority" regarding issue in question. Allen v City of Athens (1996, ND Ala) 937 F Supp 1531

...municipality is responsible under §1983 for action directed by those who establish governmental policy, whether that action is taken only once or taken repeatedly; municipal liability for damages under §1983 attaches where--and only where--deliberate choice to follow course of action is made from among various alternatives by official responsible for establishing final policy with respect to subject matter in question. Pembaur v Cincinnati (1986) 475 US 469, 89 L ED 2d 452, 106 S Ct 1292

Knowledge of and continued acquiescence in illegal actions by municipality's employees may be sufficient policy or custom to give rise to municipality's liability under §1983. Villa v Franzen (1981, ND Ill) 511 F Supp 231, affd (1987, CA7 Ill) 810 F2d 715

Municipality may still be liable for employee's action, even where employee's action is alleged to be intentional, where facts adduced at trial prove policy, custom or practice amounting to, at very least, authorization, deliberate indifference, or gross neglect of legal duty owed to plaintiff in action under 42 USCS §1983. Means v Chicago (1982, ND Ill) 535 F Supp 455

Second amended complaint asserting §1983 claim against city will not be dismissed, despite some lack of specificity in factual predicate for municipal liability, because complaint asserts that city inspector general had ultimate responsibility for making as well as for carrying out unconstitutional policy that caused plaintiff's injuries. Rae v Klusak (1993, ND Ill) 810 F Supp 983

Suits under 42 USCS §1983 against city officials in their official capacities are to be treated as suits against the city. Varela v Jones (1984, CA10 NM) 746 F2d 1413

Municipality may be held liable under 42 USCS §1983 on basis of policy of deliberate indifference to constitutional rights of persons within its domain. Fiacco v Rensselaer (1986, CA2 NY) 783 F2d 319

City is liable for damage judgment rendered under 42 USCS §1983 against director of police department in his official capacity. Brandon v Holt (1985) 469 US 464, 83 L ED 2d 878

For purposes of determining liability under 42 USCS §1983, proof that municipality's authorized decision-maker intentionally deprived plaintiff of federally protected right necessarily establishes that municipality acted culpably; similarly, conclusion that action taken or directed by authorized decision-maker itself violates federal law will also determine that municipal action was moving force behind injury of which plaintiff complains. Board of the County Comm'rs v Brown (1997) 520 US 397, 137 L ED 2d 626, 117 S Ct 1382

City policeman's acts while in line of duty made him and city liable for damages, latter to extent of liability insurance policy carried by the city. McArthur v Pennington (1963, Ed Tenn) 253 F Supp 420

It should be noted that these local governments carry liability insurance.

QUESTION TWO

On or about June 22, 2002, this Petitioner filed in Federal District Court a **Motion to Deny Protective Order and Resume**

Discovery. The court never responded to this request during time it was filed until the time this action was dismissed. Counsel for the defendants filed **Motions to Dismiss** on or about April 1, 2002 and August 2, 2002. Note 130, Rule 12, from the Federal Rules of Civil Procedure states:

> Motions under Rule 12(b)(6), made at the very outset of the litigation before there has been any pre-trial discovery, are premature. Klebanow v Funston (1964, SD NY) 35 FRD 518

It is obvious that there was a Rule 12(b)(6) motion to dismiss at the very outset of this litigation, and undeniable that pre-trial discovery was not allowed. Petitioner claims that he is entitled to conduct discovery pertinent to the immunity issues that the Federal District Court cited as basis for dismissal.

Note 135, from Rule 12 of F.R.C.P. states:

> Although dismissal under Rule 12(b)(6), which amounts essentially to summary judgment, should not be granted until opposing party has been afforded discovery, dismissal is proper where record of review makes it clear to court that discovery would be fruitless. SEC v Seaboard Corp. (1982, CA Cal) 677 F2d 1315

As Petitioner pointed out in question one, the Town of Wardensville and Hardy County were not immune from liability due to the theory of *respondeat superior* since the prosecuting attorney and town chief of police had "final policy-making authority" and that the actions taken by them were on behalf of and authorized by their respective local governments. With discovery, Petitioner could firmly establish this "policy-making authority," thus it could not be "clear to the court that discovery would be fruitless."

The case of Barley v Luzerne County Bd. of Elections, M.D. Pa. 1995, F Supp. 828 best defines the need for discovery in regard to the issue of immunity:

> ...in addition to fact that state law cannot immunize person against federal civil rights action, immunity defense would best be considered after some discovery had been conducted, not on motion to dismiss.

Finally, the summary in Harlow v Fitzerald, 457 US at 814, 73 L Ed 2d 396 indicates this Court's position on this issue:

> Brennan J., joined by Marshall and Blackmun, J.J., concurred, expressing the view that , in suits for civil damages against public officials based upon their official acts, (1) some measure of discovery may sometimes be required to determine exactly what a public official defendant did know at the time of his actions, and (2) discovery of defendant's knowledge should be deferred by the trial judge pending decision of any motion of defendants for summary judgment on grounds that plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred.

It should be noted that defendants never made such motion in regard to the threshold matter in regard to violation of constitutional rights. More importantly, according to the above summary, discovery should have been allowed after this Petitioner was afforded the opportunity to demonstrate that a violation of his constitutional rights occurred.

Discovery should have been allowed if for no other reason than to provide the Court with the facts with which to fairly rule on the immunity issue in order to see justice served.

QUESTION THREE

According to Note 122 from Rule 12 of F.R.C.P., dismissal due to failure to state a claim for which relief can be granted is "reserved for extreme cases." Petitioner states that this is not such extreme case, and offers the following in support:

> Law favors disposition of litigation on its merits and dismissal is harsh sanction to be resorted to only in extreme cases. Meeker v Risley (1963, CA10 Okla) 324 F2d 269

Where record was insufficient to determine beyond doubt that plaintiff could prove no set of facts in support of his claim that would entitle him to relief, district court's dismissal of plaintiff's claim under 12(b)(6) must be reversed and remanded. Gotcher v Wood (1995, CA9 Wash) 66 F3d 1097

As per the issues raised in questions one and two, it is obvious that the record was insufficient to prove beyond doubt that this Petitioner could prove no set of facts in support of his claim that would entitle him to relief. The Federal District Court should not have dismissed this case, and the Court of Appeals decision not to reverse and remand this case was in conflict with previous rulings on this matter.

Conclusion

As previously indicated, the basis for review of the dismissal of this case by this Court is that it was in direct conflict with previous rulings of the U.S. Supreme Court as well as various other rulings by different U.S. Courts of Appeals. There is a larger and more important issue as to why this should be addressed by this Court.

The intent of §1983, Title 42 of the U.S. Code was to protect citizens such as myself from wrongdoing by government

officials. It was to serve as a safeguard of one's Fourteenth Amendment civil rights. This is an issue with the potential to affect every citizen of this country. I believe its purpose to be twofold: First, to serve as a deterrent in order to prevent government abuse, and second, to provide remedy and redress for those who have been wronged.

The cases cited by this Petitioner as to why the named local governments are not entitled to immunity are crystal clear as to their intent. They contain no ambiguity on this issue, yet they were ignored first by the District Court and then by the Court of Appeals.It is realized by this Petitioner from his experiences in the legal system and from candid admissions by attorneys and two ex judges that no matter how diligent the pro se litigant, there is a certain bias and resentment in the legal community which makes true justice practically impossible. It becomes an even more difficult hurdle to overcome when the defendants are a prosecutor, police officer and local government.

This is why it is incumbent for this Court to make the difficult choice and do the right thing. The Constitution is nothing but a meaningless piece of paper without people who possess the courage and integrity to see it applied consistently and in a just manner for all concerned.

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Terrence A. McCrady
Petitioner, *pro se*

Date: 6-12-03

APPENDIX A

UNITED STATES DISTRICT COURT

Northern DISTRICT OF West Virginia

ENTERED
NOV 7 - 2002
U.S. DISTRICT COURT
MARTINSBURG, WV 25401

JUDGMENT IN A CIVIL CASE

Terrence McCrady,
Plaintiff,
V.

Case Number: **3 :02cv23**

The Town of Wardensville, Hardy County, William D. Moomau, Donald Rotruck, and David Warren, Defendants.

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issued have been tried and the jury has rendered its verdict.

X **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The defendants moved to dismiss the charges, pursuant to Federal Rule of Civil Procedure 12(b)(6), for plaintiff's failure to state a claim upon which relief can be granted.

The Court hereby **ORDERS** the defendant's Motion to Dismiss be **GRANTED** and the complaint be **DISMISSED** with prejudice and retired from the docket of the Court.

11/7/02
Date

Wally Edgell, Ph.D.
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICTOF
WEST VIRGINIA
Martinsburg Division

ENTERED
NOV 7 - 2002
U.S. DISTRICT COURT
MARTINSBURG, WV 25401

TERRENCE McCRADY,
Plaintiff,

v. **CIVIL ACTION NO. 3:02 CV23**
(BROADWATER)

THE TOWN OF WARDENSVILLE,
HARDY COUNTY, WILLIAM D. MOOMAU,
DONALD ROTRUCK, and DAVID WARREN
Defendants

ORDER

The plaintiff in this case brought civil charges against certain government officials involved in his criminal prosecution for the shooting death of Donald Sager, Jr. Specifically, plaintiff sought damages from William D. Moomau, Hardy County prosecutor; Donald Rotruck and David Warren, Town of Wardensville policemen; and the Town of Wardensville for its employment of Moomau, Rotruck, and Warren. Defendant Town contends the theory of *respondeat superior* immunizes it from liability for plaintiff's investigation and prosecution. Furthermore, the individual defendants contend they enjoy absolute immunity from civil charges plaintiff brings resulting from his criminal prosecution. Thus, the defendants moved to dismiss the charges, pursuant to Federal Rule of Civil Procedure 12(b)(6), for plaintiff's failure to state a claim upon which relief can be granted.

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943,952 (4th Cir.), cert. denied, 510 U.S. 1993, citing 5A C. Wright & A. Miller, *Fed. Practice and Procedure* § 1356 (1990). "A motion to

dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of [the subject] claim." McNair v. Lend Lease Trucks, Inc., 95 F.3d 325,328 (4th Cir. 1996) (en banc) citing Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324,325 (4th Cir. 1989). Furthermore, when reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must assume all of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiff, and must view the allegations in a light most favorable to the plaintiff. *See* Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999).

The Court finds Defendant Moomau is entitled to absolute immunity for the performance of his prosecutorial functions.1 Such immunity extends to liability for acts taken in "the initiation and pursuit of a criminal prosectuion, including presentation of the state's case at trial."2 Furthermore, defendants Rotruck and Warren are protected by the derivative prosecutorial immunity provided to government witnesses under Lyles v. Snarks.3 Finally, the Court agrees with defendants that the Town of Wardensville is also immune from liability under the theory of *respondeat superior,* long recognized by the United States Supreme Court of Appeals.4 Thus, the Court finds there to be no factual situation under which plaintiff would be entitled to relief.

The Court hereby **ORDERS** the defendants' Motion to Dismiss5 be **GRANTED** and the

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1 Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976).

2 Buckley, 509 U.S. at 269.

3 79 F.3d 372, 377 (4th Cir. 1996).

4 Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 694 (1978)

5 Document # 3.

complaint be **DISMISSED** with prejudice and retired from the docket of the Court.

The Court further **ORDERS** the following motions to be **DENIED** as moot:

1) Defendant Warren's Motion for Protective Order[6]
2) Plaintiff McCrady's Motion to Deny Protective Order and Resume Discovery[7]
3) Defendant Town of Wardensville's Motion to Dismiss Amended Pleading[8]
4) Plaintiff McCrady's Motion to Deny Motion to Dismiss Amended Pleading[9]

The Clerk is directed to transmit true copies of this Order to all counsel of record herein.

It is so **ORDERED.**

DATED this 6th day of November 2002.

W. Craig Broadwater

W. CRAIG BROADWATER
UNITED STATES DISTRICT JUDGE

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6 Document # 22.

7 Document # 24.

8 Document # 30.

9 Document # 31.

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02—2421

TERRENCE MCCRADY,

Plaintiff - Appellant,

versus

THE TOWN OF WARDENSVILLE; HARDY COUNTY; WILLIAM D. MOOMAU; DONALD ROTRUCK; DAVID WARREN,

Defendants - Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. W. Craig Broadwater, District Judge. (CA-02-23-3)

Submitted: February 6, 2003 Decided: February 12, 2003

Before WILKINS, MICHAEL, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Terrence McCrady, Appellant Pro Se. Michael Douglas Lorensen, BOWLES, RICE, MCDAVID, GRAFF & LOVE, Martinsburg, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Terrence McCrady appeals the district court's order denying relief on his 42 U.S.C. § 1983 (2000) complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm substantially on the reasoning of the district court. See McCrady v. Town of Wardensville, No. CA-02-23-3 (N.D.W. Va. Nov. 7, 2002). We deny McCrady's motion for oral argument and his motion to strike Appellees' informal brief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 19,2003

No. 02-2421
CA-02-23-3

TERRENCE MCCRADY

Plaintiff - Appellant

V.

THE TOWN OF WARDENSVILLE; HARDY COUNTY; WILLIAM D. MOOMAU; DONALD ROTRUCK; DAVID WARREN

Defendants - Appellees

ORDER

The appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/S/ Patricia S. Connor
CLERK